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4 **UNITED STATES DISTRICT COURT**
5 **SOUTHERN DISTRICT OF CALIFORNIA**
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7 UNITED STATES OF AMERICA,
8 Plaintiff/ Respondent,
9 v.
10 CARLOS GREGORIO MARTINEZ,
11 Defendant/ Petitioner.

CASE NO. 93cr206 WQH
CASE NO. 16cv1562 WQH

ORDER

12 HAYES, Judge:

13 The matter before the Court is the motion pursuant to 28 U.S.C. § 2255 filed by
14 Defendant/Petitioner Carlos Gregorio Martinez. (ECF No. 85).

15 **PROCEDURAL BACKGROUND**

16 On August 25, 1993, Defendant was sentenced to the statutory maximum of 180
17 months on Count 1, armed carjacking a motor vehicle in violation of 18 U.S.C. § 2119;
18 a mandatory 60 month sentence on Count 2, Use and Carrying of a Firearm during the
19 commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1); and 360
20 months on Count 3, being a felon in possession of a firearm, in violation of 18 U.S.C.
21 §§ 922(g)(1) and 924(e). The Court ordered that the 360 months sentence on Count
22 3 be served concurrently with the 180 months sentence on Count 1, and that the 60
23 month sentence on Count 2 be served consecutively to Count 1 and 3 for a total term
24 of imprisonment of 420 months.

25 On June 26, 2015, the United States Supreme Court determined that the section
26 of the Armed Career Criminal Act (“ACCA”) known as the “residual clause” was void
27 for vagueness in *Johnson v. United States*, 576 U.S. – , 135 S.Ct. 2551 (2015). The
28 ACCA residual clause provided enhanced penalties for a defendant with a “violent

1 felony,” that is, a felony that “otherwise involves conduct that presents a serious
 2 potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). The
 3 Supreme Court stated,

4 We are convinced that the indeterminacy of the wide-ranging inquiry
 5 required by the residual clause both denies fair notice to defendants and
 6 invites arbitrary enforcement by judges. Increasing a defendant’s sentence
 7 under the clause denies due process of law.

8 135 S.Ct. at 2557. The Supreme Court subsequently determined that *Johnson* stated a
 9 “new substantive rule that has retroactive effect in cases on collateral review.” *Welch*
 10 *v. United States*, – U.S. –, 136 S.Ct. 1257, 1268 (2016).

11 On June 17, 2016, Defendant moved the Court to vacate, set aside or correct his
 12 sentence under 28 U.S.C. § 2255 based upon *Johnson*. Defendant contends that his
 13 term of imprisonment of 360 months in Count 3 must be set aside because his California
 14 burglary convictions are no longer “violent felonies” under the Armed Career Criminal
 15 Act after *Johnson*. Defendant further contends that his term of imprisonment of 60
 16 months in Count 2 must be set aside because his armed carjacking conviction is no
 17 longer a “crime of violence” after *Johnson*.

18 On November 1, 2016, the Court of Appeals for the Ninth Circuit authorized
 19 this district court to proceed with this second or successive 28 U.S.C. § 2255 motion.
 20 (ECF No. 89-1).

21 On November 21, 2016, Plaintiff United States filed an response. Plaintiff states
 22 that “Martinez is no longer considered a career offender pursuant to *Johnson* based to
 23 his conviction as a felon in possession of a firearm, but he remains subject to the five-
 24 year mandatory consecutive sentence for using a weapon during a crime of violence.”
 25 (ECF No. 93at 2). The Government asserts that “the Court should resentence Martinez
 26 on Count 3 to the statutory maximum of ten years.” *Id.* at 21.

27 On November 27, 2016, Defendant filed a reply. Defendant asserts that he has
 28 already served 23 years in custody which is more that the maximum sentence of 15
 years for carjacking on Count 1 and the five year consecutive sentence for his § 924(c)

conviction on Count 2.

APPLICABLE LAW

28 U.S.C. § 2255 provides that “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255.

RULING OF THE COURT

Defendant contends and the Plaintiff agrees that the Defendant’s sentence of 360 months on Count 3, being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) is no longer valid in light of *Johnson*. The Court concludes that Defendant is entitled to relief under 28 U.S.C. § 2255 to set aside his sentence on Count 3.¹

IT IS HEREBY ORDERED that the motion pursuant to 28 U.S.C. § 2255 filed by Defendant/Petitioner Carlos Gregorio Martinez. (ECF No. 85) is granted as to Count 3. Judgment entered August 25, 1993 is vacated as to Count 3. The Government shall immediately prepare a writ for Defendant’s appearance for resentencing. Probation shall provide the original presentence report and prepare an addendum by January 17, 2017. Status hearing regarding resentencing is set for January 23, 2017 at 9 a.m. in Courtroom 14B.

DATED: December 23, 2016


WILLIAM Q. HAYES
 United States District Judge

¹ The Court reserves ruling on Defendant’s motion to vacate to Count 2.